THE TAXATION OF FOREIGN CORPORATIONS.

THE jurisdiction of a state to levy taxes, like jurisdiction in general, depends in the last analysis on power. A state may lay a tax on anything from which it has power to exact payment. It may tax all persons domiciled within its territory, all property situated within its territory, and all acts done within its territory. As Mr. Justice Field said:[1]

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though, as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

A foreign corporation, being unable to leave in person the state of charter, and thus become domiciled in another state, cannot be personally taxed; it can be taxed, therefore, only upon its property within the taxing state, and upon its acts there done.

A tax levied upon property outside the jurisdiction of the taxing state is forbidden by the Fourteenth Amendment to the Constitution of the United States, as a taking of property without due process of law; and the question of jurisdiction to tax may therefore always be raised.

Let us now examine various classes of property and business, in

[1] State Tax on Foreign-Held Bonds, 15 Wall. 300.

order to determine the power of a state to tax a foreign corporation upon them.

A foreign corporation is liable to taxation in any state upon all its tangible property, real or personal, situated within the state.[1] The foreign corporation is to be treated like any other owner of taxable property. It is, of course, always a question whether a foreign corporation comes within the language of a statute which imposes a tax; for such statutes are often so phrased as to exclude foreign corporations. A statute subjecting "non-residents" to taxation on the sums invested in business includes foreign corporations;[2] while on the other hand a statute providing for taxation of personal estate in the city where the owner is an "inhabitant" does not render the property of a foreign corporation liable to taxation, since it is not an inhabitant of any place within the state.[3] So where the cars of a railroad company were by statute taxable at the home office or principal place of business of the company, the cars of a foreign railroad company could not be taxed, since its principal place of business was outside the state.[4]

Mere intangible property, not represented by a tangible security of value, is not in fact situated anywhere, or subject to any jurisdiction by reason of its *situs*. It is, to be sure, often said that a chose in action has a *situs* with the debtor, or with the creditor; and courts are in hopeless confusion on the question whether the obligation should properly be held to be situated with the one or the other. But to assign place to an intangible and incorporeal thing is at most a mere fiction, upon which jurisdiction for taxation should not be founded. Such intangible property can be reached only through the owner and at his domicil, since it forms part of his property, and he may be taxed according to the amount of his property.

But there is a growing tendency to assign certain kinds of intangible property to some *situs*, and permit their taxation there. In

[1] W. U. Tel. Co. *v.* Texas, 105 U. S. 460; Atlantic & P. Tel. Co. *v.* Philadelphia, 190 U. S. 160; Armour Packing Co. *v.* Savannah, 115 Ga. 140, 41 S. E. Rep. 237; Griggsry Const. Co. *v.* Freeman, 108 La. 435, 32 So. Rep. 399; Blackstone Mfg. Co. *v.* Blackstone, 13 Gray 488; Attorney-General *v.* Bay State Mining Co., 99 Mass. 148; Boston Loan Co. *v.* Boston, 137 Mass. 332; British Comm. L. Ins. Co. *v.* Commissioners, 31 N. Y. 32; People *v.* Barker, 141 N. Y. 118.

[2] People *v.* Barker, 141 N. Y. 118; People *v.* Feitner, 62 N. Y. Supp. 1107, 49 App. Div. 108.

[3] Boston Investment Co. *v.* Boston, 158 Mass. 461.

[4] Appeal Tax Court of Baltimore *v.* Pullman P. C. Co., 50 Md. 452.

Adams Express Co. *v.* Ohio State Auditor,[1] Brewer, J., used this most suggestive and pregnant language:

"In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are, and as possessing a value which is accorded to them in the markets of the world; and that no finespun theories about *situs* should interfere to enable these large corporations, whose business is, of necessity, carried on through many states, from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires."

Of intangible property which may be assigned a *situs* for purposes of taxation, the clearest case is that of commercial securities. Stocks and bonds, and other mercantile securities of value in themselves and salable, are treated like tangible property, being regarded as within the jurisdiction of the state in which they may be found. A foreign corporation is therefore taxable for all such mercantile securities owned by it within the state, including stocks, bonds, bank-notes, promissory notes of individuals, etc.[2] So where by statute a foreign insurance company is required to deposit bonds with the state as a condition of doing business, the bonds may be taxed.[3]

This has been carried so far that money deposited in a bank by the corporation or its agent, not for transmission to the home office but for use within the state, may, it is held, be taxed as property within the state.[4]

One of the most important forms of intangible property so taxed is that employed in business. Capital employed in business within a state, in whatever form it is, may be reached by the state for purposes of taxation; and the greater portion of this business capital may be in an intangible form: good-will, claims receivable, etc., are assets of the business, and by the doctrine now prevailing are taxable at the place of business.

Thus the Supreme Court of the United States has held that the intangible property of a foreign corporation, created by the acquisition of franchises and privileges within the state, may be taxed.[5] Mr. Justice Brewer said:

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[1] 166 U. S. 185.

[2] New Orleans *v.* Stempel, 175 U. S. 309; People *v.* Roberts, 49 N. Y. Supp. 10, 25 App. Div. 16.

[3] Western Assur. Co. *v.* Halliday, 110 Fed. Rep. 259; People *v.* Home Ins. Co., 29 Cal. 533; British Commercial Life Ins. Co. *v.* Commissioners, 31 N. Y. 32.

[4] New Orleans *v.* Stempel, 175 U. S. 309; Blackstone *v.* Miller, 188 U. S. 189.

[5] Adams Exp. Co. *v.* Ohio State Auditor, 166 U. S. 185.

"It matters not in what this intangible property consists, — whether privileges, corporate franchises, contracts, or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country. . . .

"Suppose an express company is incorporated to transact business within the limits of a state, and does business only within such limits, and, for the purpose of transacting that business, purchases and holds a few thousands of dollars' worth of horses and wagons, and yet it so meets the wants of the people dwelling in that state, so uses the tangible property which it possesses, so transacts business therein, that its stock becomes in the markets of the state of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purposes of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the crudity of taxing laws which reach only the one, and ignore the other; while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation. . . .

"Where is the *situs* of this intangible property? Is it simply where its home office is, where is found the central directing thought which controls the workings of the great machine, or in the state which gave it its corporate franchise; or is that intangible property distributed wherever its tangible property is located and its work is done? Clearly, as we think, the latter. . . . The Southern Pacific Railway Company is a corporation chartered by the state of Kentucky; yet, within the limits of that state, it is said to have no tangible property, and no office for the transaction of business. The vast amount of tangible property which, by lease or otherwise, it holds and operates, and all the franchises to do which it exercises, exist and are exercised in the states and territories on the Pacific slope. Do not these intangible properties, — these franchises to do, — exercised in connection with the tangible property which it holds, create a substantive matter of taxation to be asserted by every state in which that tangible property is found?"

It has been thought worth while to quote at length from this opinion, because in it is expressed, more forcibly perhaps than anywhere else, a distinct tendency of the law; a tendency which is likely to lead to novel methods of taxing "values," to use a mercantile term, rather than property in the legal sense. To the

extent of taxing the value of a business at the place where it is carried on, the law is already settled.

On this principle choses in action, whether book accounts, promissory notes, or other credits due in the regular course of business carried on by a foreign corporation within a state are taxable.[1]

So the good-will of a business, the result of exercising the corporate franchise and carrying on business within the state, is taxable there.[2] So too it would seem that the franchise of a foreign corporation to do business within a state may be taxed there as property.[3]

But if the business carried on in New York is merely the collection and distribution of dividends on the stock of another foreign corporation, the corporation, though carrying a large balance at all times in a New York bank, cannot be said to be employing capital within the state and is not taxable.[4] And when this intangible property is a franchise for a ferry granted by another state, which is regarded as an incorporeal hereditament, it cannot be included in any scheme of taxation, for it is without the state.[5]

Where this intangible property results from the entire business carried on in several states, it is obvious that one of these states cannot claim the whole of the property as taxable. The proper proceeding in that case is to tax that proportion of the whole amount which the amount of business done within the state bears to the total amount of business.[6]

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[1] London, etc., Bk. *v.* Block, 117 Fed. Rep. 900; Armour Packing Co. *v.* Savannah, 115 Ga. 140, 41 S. E. Rep. 237; Hubbard *v.* Brush, 61 Oh. St. 252, 55 N. E. Rep. 829; People *v.* Barker, 48 N. Y. Supp. 553, 23 App. Div. 524; People *v.* Barker, 53 N. Y. Supp. 921, 31 App. Div. 263; Jesse French Piano & Organ Co. *v.* Dallas, Tex. Civ. App., 61 S. W. Rep. 942. See *contra*, Liverpool, etc., Ins. Co. *v.* Assessors, 44 La. Ann. 760, 11 So. Rep. 91.

[2] People *v.* Roberts, 159 N. Y. 70, 53 N. E. Rep. 685; People *v.* Roberts, 55 N. Y. Supp. 317, 37 App. Div. 1. But see *contra* Hart *v.* Smith, 159 Ind. 182, 64 N. E. Rep. 661 (*semble*).

[3] London, etc., Bank *v.* Block, 117 Fed. Rep. 900; Oakland Sugar Mill Co. *v.* Fred W. Wolf Co., 118 Fed. Rep. 239.

[4] People *v.* Roberts, 154 N. Y. 1, 47 N. E. Rep. 974.

[5] Louisville & J. Ferry Co. *v.* Kentucky, 188 U. S. 385.

[6] W. U. Tel. Co. *v.* Mass., 125 U. S. 530; Massachusetts *v.* W. U. Tel. Co., 141 U. S. 40; Adams Exp. Co. *v.* Ohio, 166 U. S. 185; New York *v.* Roberts, 171 U. S. 658; W. U. Tel. Co. *v.* Missouri, 190 U. S. 412; People *v.* Roberts, 152 N. Y. 59, 46 N. E. Rep. 161; Commissioners *v.* Old Dominion S. S. Co., 128 N. C. 558, 39 S. E. Rep. 558; Com. *v.* Standard Oil Co., 101 Pa. St. 119.

Under the New York Statute taxing foreign corporations on their "franchise or business" on the basis of the amount of capital stock used within the state, the actual and not the par value of the stock is the amount to be assessed.[1]

It is to be noticed that such a tax may include a tax upon tangible property. In that case if the tangible property has already been taxed as such in the same state, the tax on the business might to that extent be invalid as double taxation.[2]

While double taxation in the same state is forbidden by the constitutions of most states and by the Fourteenth Amendment to the Constitution of the United States, there is nothing to prevent the same property being taxed by as many states as can get power over it. Thus the property and franchises of a corporation may be held and exercised in several states; and the value of them gives to the shares of stock their entire value. These shares may be in one state while the owner is domiciled in another. If all these states are different, the same property may be taxed four times without infringing the Constitution; the constitutional limitations extend only to double taxation in the same jurisdiction.[3] "No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far."[4] Double taxation of this sort, however unjust, cannot be declared illegal unless it is contrary to some express constitutional provision.[5]

Corporate stocks and bonds, therefore, though their intrinsic value is derived entirely from the property owned by the company and taxed as its property, may be themselves taxed in another state.[6] The stockholder or bondholder may be taxed at his domicil on the value of his securities, though the company be a foreign one;[7] and,

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[1] People *v.* Knight, 173 N. Y. 255, 65 N. E. Rep. 1102.

[2] S. W. Tel. & Tel. Co. *v.* Merschudt (Tex. Civ. App.), 65 S. W. Rep. 381.

[3] Sturges *v.* Carter, 114 U. S. 511; San Francisco *v.* Fry, 63 Cal. 470.

[4] McKENNA, J., in Kidd *v.* Alabama, 188 U. S. 730, 732.

[5] Griggsry Const. Co. *v.* Freeman, 108 La. 435, 32 So. Rep. 399; State *v.* Branin, 3 Zab. 484; Dyer *v.* Osborn, 11 R. I. 321.

[6] Greenleaf *v.* Board of Review, 184 Ill. 226, 56 N. E. Rep. 295; Seward *v.* Rising Sun, 79 Ind. 351; State *v.* Branin, 3 Zab. 484; Dyer *v.* Osborn, 11 R. I. 321.

[7] Kidd *v.* Alabama, 188 U. S. 730, affirming State *v.* Kidd, 125 Ala. 413, 28 So. 480; Greenleaf *v.* Board of Review, 184 Ill. 226, 56 N. E. Rep. 295; Seward *v.* Rising Sun,

as has already been seen, these securities may also be taxed where they are held, though it is apart from the domicil of the owner. But the corporation itself cannot be taxed on the shares and bonds, since it is not the owner. In the case of bonds the owner cannot be taxed by the state of charter if the securities are not there nor the owner domiciled there; since the property which the securities are deemed to be when they are separately taxed is not there.[1] "Debts owing by corporations, like debts owing by debtors, are not property of the debtors in any sense. . . . All the property there can be in the nature of things in debts of corporations belongs to the creditors, to whom they are payable, and follows their domicil, wherever that may be. . . . The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the state, they are property beyond the jurisdiction of the state."[2]

It would seem that the same doctrine should be held in the case of stock, and that the owner could be taxed on stock away from his domicil only in some place where the certificates were kept. And it is so held in some cases.[3] But the Supreme Court of the United States has held that shareholders are taxable where the corporation is situated; Waite, C. J., saying:[4] "A share of bank stock may be in itself intangible, but it represents that which is tangible. It represents money or property invested in the capital stock of the bank. That capital is employed in business by the bank, and the business is very likely carried on at a place other than the residence of some of the shareholders. The shareholder is protected in his person by the government at the place where he resides; but his property in this stock is protected at the place where the bank transacts his business. If he were a partner in a

79 Ind. 351; Great Barrington *v.* County Commrs., 16 Pick. 572; State *v.* Bentley, 3 Zab. 532; Newark City Bank *v.* Assessor, 30 N. J. Law 13; Lander *v.* Burke, 65 Oh. St. 532, 63 N. E. Rep. 69; McKeen *v.* Northampton County, 49 Pa. St. 519; Whitesell *v.* Northampton County, 49 Pa. St. 526. But see *contra* Smith *v.* Exeter, 37 N. H. 556.

[1] State Tax on Foreign-Held Bonds, 15 Wall. 300.

[2] FIELD, J., in State Tax on Foreign-Held Bonds, *supra.*

[3] San Francisco *v.* Mackey, 22 Fed. Rep. 602; Railroad *v.* Commrs., 91 N. C. 454; Union Bank *v.* State, 9 Yerg. 490.

[4] Tappan *v.* Merchants' Nat. Bank, 19 Wall. 490, 503. In Jermain *v.* R. R., 91 N. Y. 483, 492, EARL, J., expressed the same idea: "A share of stock represents the interest which the shareholder has in the capital and net earnings of the corporation."

private bank doing business at the same place, he might be taxed there on account of his interest in the partnership. It is not easy to see why, upon the same principle, he may not be taxed there on account of his stock in an incorporated bank. His business is there as much in the one case as in the other. He requires for it the protection of the government there, and it seems reasonable that he should be compelled to contribute there to the expenses of maintaining the government."

The same doctrine has been held in New York [1] as to the Transfer Tax Act, which taxed succession on death. In Matter of Bronson Gray, J., thus explained the difference between bonds and stock in this respect:[2]

"The attitude of a holder of shares of capital stock is quite other than that of a holder of bonds towards the corporation which issued them. While the bondholders are simply creditors, whose concern with the corporation is limited to the fulfilment of its particular obligation, the shareholders are persons who are interested in the operation of the corporate property and franchises, and their shares actually represent undivided interests in the corporate enterprise. . . . That right as a chose in action must necessarily follow the shareholder's person; but that does not exclude the idea that the property as to which the right relates, and which is, in effect, a distinct interest in the corporate property, is not within the jurisdiction of the state for the purpose of assessment upon its transfer through the operation of any law, or of the act of its owner."

But it is submitted that the supposed distinction between bonds and stock in this respect does not exist. It is true, as has been seen, that the owner is taxable upon the capital and proceeds of a business where that business is carried on, and that a partner in a firm is therefore taxable on the value of the firm business where the firm acts; and that in many ways the shareholder in a private corporation is like a partner. But the very difference in their legal position should lead to a difference in taxation. The partner is taxed on the business of the firm because he is the legal representative of the business; there is no one else to tax. The tax paid by the partners is the tax and the only tax on the firm. But the corporation, being a legal entity, is itself, as has been seen, taxed upon the business done; to tax the stockholders also

[1] Matter of Bronson, 150 N. Y. 1, 44 N. E. Rep. 707; *In re* Cushing's Estate, 82 N. Y. Supp. 795, 40 Misc. 505.

[2] At p. 8.

upon it is to tax the very same thing twice. The legal interest of the partner in the business is that of owner: the legal interest of the stockholder is not that of owner but of creditor; to him is due from the corporation a share of the net profits. His claim is a personal one against the corporation; like the bondholder, he has only a chose in action, and no direct legal interest in the business.

In the case of a transfer tax it would seem that the state of charter might tax the privilege to the new owner of the certificate, whether upon death or by transfer *inter vivos*, to be registered as stockholder on the books of the company; and it has been suggested that this right would support the New York Transfer Tax Act so far as it might be enforced at the time of transfer on the books of the company.[1] But that particular tax appears to be rested on the power of the state to tax actual property within its jurisdiction,[2] and the tax is therefore open to the criticism just made.

In order that a chattel may be taxed in a state it must have not only a momentary *situs* there, but it must be fixed there with some degree of permanence. Thus property merely in transit through the state may not be taxed;[3] nor may a vessel, not registered within a state, which merely touches at its ports.[4] But if the chattel remains within the state for a sufficient time to become

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[1] For this sound and ingenious suggestion I am indebted to my colleague Mr. Donham.

[2] See the language of GRAY, J., on p. 6.

[3] Kelley *v.* Rhoads, 188 U. S. 1; Standard Oil Co. *v.* Bachelor, 89 Ind. 1; Conley *v.* Chedic, 7 Nev. 336; Robinson *v.* Longley, 18 Nev. 71.

[4] Hays *v.* Pacific Mail S. S. Co., 17 How. 596; St. Louis *v.* Ferry Co., 11 Wall. 423; Morgan *v.* Parham, 16 Wall. 471; Johnson *v.* DeBary-Baya Merchants' Line, 37 Fla. 499, 19 So. Rep. 640; Roberts *v.* Charlevoix, 60 Mich. 197; S. *v.* Haight, 30 N. J. Law 428. It is interesting to compare with this doctrine of the common law the language of the German Reichsoberhandelsgericht in Mahler *v.* Schirmer, 6 Entsch. des R. O. H. G. 80, s. c. translated 2 Beale's Cases on Conflict of Laws 190: "The Saxon judge may therefore be in a position to subject to the claims of his local law the decision of lawsuits about movables; but the admissibility of such subjection always depends on the actual assumption that the things have come within the jurisdiction of the Saxon law. The things must be situated within Saxony. But the momentary position is not entirely decisive; there are things which are constantly changing their position without thereby losing their legal relation to the place from which they started. This is especially true of the most important instruments of transportation, ships, and railroad trains. During their journeys they touch at foreign places only in passing, with the intention of returning to the place where their legal relations are situated. The recognition of this place of departure as the place that governs their legal relations seems to be enjoined by practical necessity."

part of the whole body of property there, incorporated with the chattels of the state, it may be taxed though it is to be sent out of the state later. Thus property bought within the state for export but not yet in transit may be taxed.[1] So it has been held that a contractor's outfit, consisting of mules, scrapers, etc., to be used for several months in constructing a railroad bed was sufficiently fixed within the state to be taxed.[2] Where however a number of chattels, like boats or railroad cars, owned by the same owner, are constantly coming into and going out of a state, the state may lay a tax proportionate to the average number in the state.[3]

Since a foreign corporation may be allowed to do business in a state upon conditions, the payment of a sum of money may be made a condition; and this may in form be the payment of a tax greater than or different from that paid by a domestic corporation. Such a tax is valid.[4] It is not properly an exercise of the power to tax property, but is a license fee paid for the privilege of entering the state, and is a necessary deduction from the right absolutely to exclude the foreign corporation. Upon a similar principle the exaction of a fee for filing a certificate of incorporation is not a tax; [5] nor is a fee for filing an annual report.[6]

In most state constitutions or statutes there is a provision that all taxes shall be uniform or equal. This does not prevent a discrimination against foreign corporations by way of exacting a license fee for the privilege of doing business in the state; but the

[1] Diamond Match Co. *v.* Ontonagon, 188 U. S. 82; Standard Oil Co. *v.* Combs, 96 Ind. 179; Carrier *v.* Gordon, 21 Oh. St. 605. See also Blackstone *v.* Miller, 188 U. S. 189.

[2] Griggsry Const. Co. *v.* Freeman, 108 La. 435, 32 So. Rep. 399.

[3] Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18. See *infra*, p. 260.

[4] Ducat *v.* Chicago, 10 Wall. 410; Liverpool Ins. Co *v.* Mass., 10 Wall. 566; Pembina Mining Co. *v.* Pa., 125 U. S. 181; Maine *v.* Grand Trunk Ry., 142 U. S. 217; Horn Silver Mining Co. *v.* New York, 143 U. S. 305; New York *v.* Roberts, 171 U. S. 658; Manchester Fire Ins. Co. *v.* Herriott, 91 Fed. Rep. 711; Goldsmith *v.* Home Ins. Co., 62 Ga. 379; Ducat *v.* Chicago, 48 Ill. 172; W. U. Tel. Co. *v.* Lieb, 76 Ill. 172; Com. *v.* Milton, 12 B. Mon. 212; Phœnix Ins. Co. *v.* Com., 5 Bush 68; State *v.* Ins. Co. of North Amer., 115 Ind. 257; Blackmer *v.* Royal Ins. Co., 115 Ind. 291; State *v.* Lothrop, 10 La. Ann. 398; State *v.* Fosdick, 21 La. Ann. 434; State *v.* Hammond Packing Co., 34 So. Rep. 368; Atty.-Gen. *v.* Bay State Mining Co., 99 Mass. 148; *Ex parte* Cohn, 13 Nev. 424; Tatem *v.* Wright, 3 Zab. 429; People *v.* Fire Assoc. of Phila., 92 N. Y. 311; Fire Dept. *v.* Noble, 3 E. D. Smith 440; W. U. Tel. Co. *v.* Mayer, 28 Oh. St. 521; Southern Gum Co *v.* Laylin, 66 Ohio St. 578, 64 N. E. Rep. 564; Slaughter *v.* Com., 13 Gratt. 767; Fire Dept. of Milwaukee *v.* Helfelstein, 16 Wis. 136.

[5] Ashley *v.* Ryan, 153 U. S. 436.

[6] Southern Gum Co. *v.* Laylin, 66 Oh. St. 578, 64 N. E. Rep. 564.

same license fee must be exacted from all corporations of the same class.[1] And such a license fee does not come within the provision of the constitution that taxation must be for revenue only.[2] Of the nature of the imposition of a license fee is the provision that an agent of a foreign corporation shall be responsible for the tax assessed upon it.[3]

Not only may a license fee be exacted for allowing the foreign corporation to do business, but a direct tax may be laid (in the absence of constitutional restriction) upon the proceeds of the business. Thus an insurance company may be taxed upon the amount of premiums received within the state.[4]

The preceding are the cases in which a state has jurisdiction to tax property and business; and in the case of foreign corporations not especially favored by the constitution a state may properly lay any such tax. But the power to regulate interstate commerce being lodged in Congress, a state legislature can lay no tax on a foreign corporation engaged in interstate commerce if the tax amounts to a regulation of such commerce. It is necessary therefore to re-examine the cases already considered with a view to the constitutional limitations.

It is clear that any tax levied upon a foreign corporation engaged in interstate commerce impedes its efficiency, and to that extent interferes with commerce. This may of course render the tax unconstitutional, but it does not necessarily do so. In the words of Field, J., in The Delaware Railroad Tax:[5]

"The tax imposed by the act in question affects commerce among the states and impedes the transit of persons and property from one state to another just in the same way and in no other that taxation of any kind necessarily increases the expenses attendant upon the use or possession of the thing taxed. That taxation produces this result of itself constitutes no objection to its constitutionality."

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[1] Manchester Fire Ins. Co. *v.* Herriott, 91 Fed. Rep. 711; American Refrig. Trans. Co. *v.* Adams, 28 Col. 119, 63 Pac. Rep. 410; People *v.* Thurber, 13 Ill. 554; Walker *v.* Springfield, 94 Ill. 364; Home Ins. Co. *v.* Swigert, 104 Ill. 653; State *v.* Ins. Co. of North America, 115 Ind. 257; Phœnix Ins. Co. *v.* Welch, 29 Kan. 672; State *v.* Hammond Packing Co., 34 So. Rep 368; *Ex parte* Cohn, 13 Nev. 424; W. U. Tel. Co. *v.* Mayer, 28 Oh. St. 521; Germania Life Ins. Co. *v.* Com., 85 Pa. St. 513; Slaughter *v.* Com., 13 Gratt. 767; Blue Jacket Consol. Copper Co. *v.* Scherr, 50 W. Va. 533, 40 S. E. Rep. 514; Fire Department of Milwaukee *v.* Helfelstein, 16 Wis. 136.

[2] Goldsmith *v.* Home Ins. Co., 62 Ga. 379.

[3] State *v.* Sloss, 83 Ala. 93.

[4] Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. 566; McNall *v.* Met. Life Ins. Co., 65 Kan. 694, 70 Pac. Rep. 604.

[5] 18 Wall. 206.

The land and chattels of a corporation engaged in interstate commerce may always be taxed without infringing the constitutional provision.[1] And this is true even if the property is used to facilitate interstate commerce, like the rolling stock of a railroad,[2] or cabs maintained by the railroad for the use of interstate passengers.[3]

It has been seen that property in actual transit through a state cannot be taxed; but where the property is used for interstate or foreign commerce a tax levied on it before or after actual transit is unconstitutional. Thus property just imported into a state, and still in the form in which it was imported, cannot be taxed, as a tax would be an interference with interstate commerce. "Goods imported do not lose their character as imports and become incorporated into the mass of property of the state, until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition."[4] For the same reason it is unconstitutional to tax chattels held in the state awaiting export. Goods lying ready for immediate shipment into another state are therefore not taxable.[5] But if the goods have arrived and are prepared for immediate use they may be taxed.[6] "The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years, or only for a day. It had become a part of the general mass of property in the state, and as such it was taxable for the current year as all other property in the city of New Orleans was taxable."[7] So if it is awaiting shipment, not immediate, but

[1] Morgan *v.* Parham, 16 Wall. 471; Transp. Co. *v.* Wheeling, 99 U. S. 273; Ferry Co. *v.* East St. Louis, 107 U. S. 365; Atlantic & P. Tel. Co. *v.* Philadelphia, 190 U. S. 385, and cases cited.

[2] Marye *v.* B. & O. Ry., 127 U. S. 117; A. & P. Ry. *v.* Lesueur (Ari.), 19 Pac. Rep. 157; Carlisle *v.* P. P. C. Co., 8 Col. 320.

[3] People *v.* Knight, 171 N. Y. 354, 64 N. E. Rep. 152.

[4] FIELD, J., in Low *v.* Austin, 13 Wall. 29, 34. This case rests in part on the constitutional prohibition on the states to lay a tax on imports; and in a case where the property has been brought from another state the property is taxable at an earlier moment. See the distinction made in Brown *v.* Houston, 114 U. S. 622; Pittsburg, etc., Coal Co. *v.* Bates, 156 U. S. 577.

[5] Ogilvie *v.* Crawford Co., 7 Fed. Rep. 745; Blount *v.* Munroe, 60 Ga. 61; State *v.* Carrigan, 39 N. J. Law 35.

[6] Brown *v.* Houston, 114 U. S. 622; Pittsburg, etc., Coal Co. *v.* Bates, 156 U. S. 577.

[7] FIELD, J., in Pittsburg, etc., Coal Co. *v.* Bates, 156 U. S. 577, 589.

at some time in the future.[1] Whether the time for immediate shipment has come is not always easy to determine. The best guide for the determination of the question is in the language of Bradley, J., in Coe *v.* Errol:[2] "When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepôt for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there if not taxed by reason of their being intended for exportation, but taxed without any discrimination in the usual way and manner in which such property is taxed in the state."

Whether railroad cars used upon a railroad in more than one state may constitutionally be taxed has been much argued. It was held in Pickard *v.* Car Co.[3] that a tax of fifty dollars on each car so used could not be imposed for the privilege of running the car through the state; but this was a tax on the business of commerce, not on the property. In Marye *v.* R. R.[4] there was a strong *dictum* to the effect that a state might probably tax such cars by proper legislation. Finally in Pullman's Palace Car Co. *v.* Pennsylvania[5] the question was decided. The car company, an Illinois corporation, had been taxed, according to a statute of Pennsylvania, upon such proportion of its capital stock as the miles of road upon which its cars were run in Pennsylvania bore to the whole number of miles of road upon which its cars were run. It was held by a majority of the court that cars run upon roads in Pennsylvania were situated in that state for the purpose of taxation, and that this was a proper way in which to tax the property of the company in such cars. There was a vigorous dissent.[6]

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[1] Diamond Match Co. *v.* Ontonagon, 188 U. S. 82.

[2] 116 U. S. 517, 525.

[3] 117 U. S. 34.

[4] 127 U. S. 117, 123.

[5] 141 U. S. 18. *Acc.* Union Ref. Transit Co. *v.* Lynch, 177 U. S. 149; State *v.* Canda C. C. Co., 85 Minn. 457, 89 N. W. Rep. 66. *Contra*, Central R. R. *v.* State Board of Assessors, 49 N. J. Law.

[6] The dissenting justices took the ground that no single car was permanently in Pennsylvania, and the *situs* of the cars was therefore no more in Pennsylvania than the

A tax proportioned to the number of passengers transported or freight carried is clearly a tax on commerce, and is bad;[1] and so is a tax on messages sent or received beyond the limits of the state.[2] If the effect of the state statute is to impose such a tax, the exact form of it is immaterial. A New York statute provided that the master of every vessel entering New York should either pay a small fee or enter into a bond for each passenger brought into the state. This was held to be unconstitutional.[3]

How far a tax upon the receipts of a corporation from interstate business may be taxed has not been altogether clear on the authorities. In 1873 the Supreme Court in the case of the State Tax on Railway Gross Receipts held that such a tax was valid.[4] But in a later case the authority of this case was shaken.[5] The case was distinguished from the State Tax on Railway Gross Receipts on two grounds: first, that in the earlier case the corporation taxed was a domestic corporation, but in the case at bar a foreign corporation; second, that in the case at bar the receipts taxed had never come into Michigan and there been mingled with the other property of the company. The tax was held invalid. This decision was followed, and the case of the State Tax on Railway Gross Receipts expressly disapproved, in Philadelphia Steamship Co. *v.* Pennsylvania,[6] where the state which chartered the corporation for interstate carriage attempted to tax the gross receipts, and the tax was held invalid. This case in turn was followed in Ratterman *v.* W. U. Tel. Co.,[7] in which it was attempted to tax the gross receipts of an interstate

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situs of a ferry-boat or other vessel is in the state at the shore of which it may touch. Hays *v.* S. S. Co., 17 How. 596; Morgan *v.* Parham, 16 Wall. 471; Transp. Co. *v.* Wheeling, 99 U. S. 273. The whole capital stock might be taxed in Illinois; and in this case the same property would therefore be taxable twice. W. U. Tel. Co. *v.* Mass., 125 U. S. 530, was distinguished on the ground that the property there taxed was fixed in the state of Massachusetts.

[1] The Passenger Cases, 7 How. 283; Crandall *v.* Nevada, 6 Wall. 35; Case of State Freight Tax, 15 Wall. 232; Erie Ry. *v.* New Jersey, 31 N. J. Law 531.

[2] Telegraph Co. *v.* Texas, 105 U. S. 460.

[3] Henderson *v.* Mayor of New York, 92 U. S. 259. MILLER, J., said: "To require a heavy and almost impossible condition to the exercise of this right [of landing passengers], with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum."

[4] State Tax on Railway Gross Receipts, 15 Wall. 284: followed in W. U. Tel. Co. *v.* Mayer, 28 Oh. St. 521; W. U. Tel. Co. *v.* Com., 110 Pa. St. 405.

[5] Fargo *v.* Michigan, 121 U. S. 230.

[6] 122 U. S. 326.

[7] 127 U. S. 411. *Accord* Ind. *v.* P. P. Car Co., 11 Biss. 561.

telegraph company; and it has been approved in several later cases.[1]

But in Maine *v.* Grand Trunk Ry.[2] the majority of the court reached a conclusion which seems to be opposed to the earlier cases. A statute of Maine required that every corporation, person, or association operating a railroad in the state should pay an annual excise tax for the privilege of exercising its franchises in the state. The amount of the tax was to be ascertained as follows: the gross receipts were to be divided by the number of miles of road operated, and the resulting average, multiplied by the number of miles operated within the state, was to be the basis of taxation. This statute was held not to be opposed to the Constitution of the United States. Field, J., who delivered the opinion of the court, said that the tax was expressly declared to be, and was, an excise tax for the privilege of exercising its franchises within the state of Maine; that it might be enacted, since the state had the right to exclude the corporation if a foreign one or refuse it the franchises if a domestic one; and that it was not a regulation of commerce, because it was not a direct tax on the receipts.[3]

This case also has been many times cited with approval. Some of the points apparently decided in it, however, can hardly be supported. The ground seemingly taken by the majority, that the tax might be supported as an excise tax for the privilege of coming into the state, is certainly unsound; for later as well as earlier cases agree that a state cannot exclude from its territory a corporation or an individual engaged in interstate commerce or in the service of the national government.[4] But the authority of

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[1] See Norfolk & W. R. R. *v.* Pa., 136 U. S. 114; Crutcher *v.* Ky., 141 U. S. 47.

[2] 142 U. S. 217.

[3] The opinion was given by FIELD, J. BRADLEY, HARLAN, LAMAR, and BROWN, JJ., dissented.

[4] "Only two exceptions or qualifications have been attached to it [the right of a state to exclude a foreign corporation] in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than half a century ago in Bank *v.* Earle, 13 Pet. 519. One of these qualifications is that the state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 112. The other limitation on the power of the state is where the corporation is in the employ of the general government,—an obvious exception, first stated, we think, by the late Mr. Justice Bradley in Stockton *v.* Railroad Co., 32 Fed. Rep. 9. 14." FIELD, J. (who delivered the opinion in Maine *v.* Grand Trunk Ry.), in Horn Silver Mining Co. *v.* New York, 143 U. S. 305.

"A state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, or a corporation in the employment of the general government,

the case being recognized, some more tenable ground must be found on which to place the decision. It will probably be found in the later case of Postal Telegraph Cable Co. *v.* Adams.[1] A statute of Mississippi laid upon all telegraph companies, domestic as well as foreign, a tax for the privilege of carrying on their business, graduated in each case upon the amount of property in miles and its value; and exempted them from all other taxation. It was found in the case that the burden of this tax was less than the ordinary tax on the same amount of property. The court said that although a franchise tax upon a corporation engaged in interstate commerce is invalid, and although this purported to be a franchise tax, yet the substance rather than the shadow was to be looked at. This tax was in lieu of another tax on property, and did in fact stand for a tax on the intangible property within the state, and it was therefore valid. And this same reasoning was applied in sustaining a "franchise" tax which was calculated upon the basis of the intangible property as well as the tangible property within the state,[2] and on the same principle it has been held in the converse case that, though the statute recites that the tax is in lieu of an ad valorem tax on property of the company located within the state, it is, if it exceeds the amount which could properly be levied under the property tax law, void as a regulation of commerce.[3]

Where a tax is laid upon such part of the receipts of an interstate carrier as are derived solely from business within the state, it is of course valid.[4] And so also is a license tax applied solely to business carried on by railroads exclusively within the borders of a state.[5] And it has been held that a tax assessed to a telephone company doing business within the state of seventy-five cents on every instrument in use, was, if the company was doing some intra-state business, valid as to those instruments used in such business.[6]

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either directly in terms or indirectly by the imposition of inadmissible conditions. Nevertheless the state may subject it to such property taxation as only incidentally affects its occupation, as all business, whether of individuals or corporations, is affected by common governmental burdens." FULLER, C. J., in Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688. For full collection of authorities see Atl. and Pac. Tel. Co. *v.* Phila., 190 U. S. 160.

[1] 155 U. S. 688, followed in W. U. Tel. Co. *v.* Taggart, 163 U. S. 1; Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194.

[2] Adams Express Co. *v.* Kentucky, 166 U. S. 171.

[3] Postal Tel. Cable Co. *v.* Richmond, 3 Va. Sup. Ct. Rep. 39, 37 S. E. Rep. 789.

[4] Pacific Express Co. *v.* Leibert, 142 U. S. 339.

[5] Nashville, C. & St. L. Ry. *v.* Ala. City, 134 Ala. 414, 32 So. Rep. 731.

[6] State *v.* Rocky Mt. Bell Tel. Co., 27 Mont. 394, 71 Pac. Rep. 311.

It was held in the time of Chief Justice Chase that a license fee laid equally upon all express companies and railroad companies doing business beyond the state was not an unconstitutional regulation of commerce.[1] But this case was overruled later; and it is now established that no state can compel a corporation by taxation to pay for the privilege of engaging in interstate commerce.[2] Thus it has been decided that a tax of fifty dollars on each car run by a foreign corporation through a state for the privilege of so running them is an unconstitutional regulation of commerce;[3] that a license tax on the establishment of an agency of a foreign corporation which is engaged in interstate commerce is an unconstitutional tax;[4] and that a statute requiring a foreign express company engaged in interstate commerce to pay a license fee and deposit a statement showing that it had a certain amount of capital, as a condition precedent to doing business within the state, was unconstitutional.[5]

The majority of the court, however, without referring to these decisions, later said that a state might enforce an excise tax as a condition of allowing a foreign railway company to run its trains into the state.[6] The case is to be sustained on another ground; but the *dictum* is unsound.[7]

It is of course clear that although a state may not exclude a corporation engaged in interstate commerce, it is not obliged to grant a franchise to such a corporation, as for instance to make it

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[1] Osborne *v.* Mobile, 16 Wall. 479. This was followed in state courts, *e. g.* W. U. Tel. Co. *v.* Richmond, 26 Gratt. 1.

[2] Leloup *v.* Mobile, 127 U. S. 640; Lyng *v.* Michigan, 135 U. S. 161; Atlantic & P. Tel. Co. *v.* Philadelphia, 190 U. S. 160 and cases cited.

[3] Pickard *v.* Car Co., 117 U. S. 34. But a tax of seventy-five cents on every telephone instrument in use has been held valid in a state court as to instruments used in intra-state business. State *v.* Rocky Mt. Bell Tel. Co., 27 Mont. 394, 71 Pac. Rep. 311. To like effect Postal Tel. Cable Co. *v.* Norfolk, 99 Va. 102, 43 S. E. Rep. 207.

[4] McCall *v* Cal., 136 U. S. 104; Norfolk & W. R. R. *v.* Pa., 136 U. S. 114; *contra*, People *v.* Wemple, 131 N. Y. 64.

[5] Crutcher *v.* Ky., 141 U. S. 47; State *v.* North. Pac. Exp. Co., 27 Mont. 419, 71 Pac. Rep. 404. The nice distinctions of fact that may arise in such a case are well shown by the case of Ficklen *v.* Shelby County, 145 U. S. 1. In that case the court, recognizing the correctness of the former decision, held that interstate commerce was not restricted to an unconstitutional extent by a statute taxing commission merchants upon their gross annual commissions, although in the case at bar all the commissions for the year had been earned upon consignments from other states. If instead of doing a general commission business the person taxed had acted as agent for a single foreign principal, the tax would have been invalid.

[6] Maine *v.* Grand Trunk Ry., 142 U. S. 217, criticised above.

[7] Horn Silver Mining Co. *v.* New York, 143 U. S. 305; Postal Tel. C. Co. *v.* Adams, 155 U. S. 688.

a domestic corporation. No fee exacted for the privilege of becoming a corporation under the law of the state can be contrary to the Constitution of the United States, whatever may be the business of the corporation.[1]

The franchise of the corporation, regarded as property, may however be taxed so far as it can be said to enter into the value of the property within the state, even if the corporation is engaged in interstate commerce, provided only it is not a franchise conferred by the United States.[2] The distinction between a tax upon the franchise and a license fee to do business is certainly a shadowy one;[3] but once the principle already considered[4] is established, that a foreign corporation may be taxed in a state, as upon its property actually there, upon its business capital, including franchise and good-will, it follows that such a tax assessed upon the franchise of a foreign corporation engaged in interstate commerce is valid as a mere tax on property within the jurisdiction.

When the state finds it necessary to furnish special police supervision for a foreign corporation engaged in interstate commerce, it may legally and constitutionally oblige the corporation to pay the reasonable expense of such supervision. Such expense need not necessarily be paid out of the general tax levy. The exaction of compensation for the supervision furnished is not a tax in any proper sense; it is compensatory, even though the amount is estimated and exacted in advance.[5]

It would seem then that a state tax upon a foreign corporation engaged in interstate commerce in order to be valid must fulfil two requirements: first, it must be levied equally upon domestic and foreign corporations; second, it must in substance be a means of making property within the state bear its share of the burdens of government. If the tax fails in either of these respects it is a tax on commerce, and is invalid.

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[1] Ashley *v.* Ryan, 153 U. S. 436.

[2] Postal Tel. Cable Co. *v.* Adams, 155 U. S. 688; Adams Exp. Co. *v.* Ohio State Auditor, 165 U. S. 194; Atlantic & Pac. Tel. Co. *v.* Philadelphia, 190 U. S. 160 and cases cited; Oakland Sugar Mill Co. *v.* Fred W. Wolf Co., 118 Fed. Rep. 239; A. & P. Ry. *v.* Lesueur (Ari.), 19 Pac. Rep. 157; State *v.* W. U. Tel. Co., 165 Mo. 502, 655 S. W. Rep. 775; People *v.* Roberts, 158 N. Y. 168, 52 N. E. Rep. 1104.

[3] BRADLEY, J., in Leloup *v.* Mobile, 127 U. S. 640; LAMAR, J., in Railroad Co. *v.* Pennsylvania, 136 U. S. 114.

[4] *Supra*, p. 250.

[5] Western U. T. Co. *v.* New Hope, 187 U. S. 419; Atlantic & P. Tel. Co. *v.* Philadelphia, 190 U. S. 160.